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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC"), as *amicus curiae,* in support of the position of appellant, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., *(Miami Herald)* that the judgment entered against it by the Supreme Court of Florida violates the First Amendment of the United States Constitution.

Consent of the Parties

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are on file with the Clerk of this Court.

Opinions Below, Jurisdiction and Statement

NBC adopts the material set forth in the equivalent sections of the brief of the *Miami Herald.*

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The principal statute involved in this case is Section 104.38, Florida Statutes, which is part of the Florida Election Code:

> "§ 104.38 **Newspaper assailing candidate in an election; space for reply**
>
> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 [by imprisonment not exceeding one year] or § 775.083 [by a fine not exceeding $1,000]."

Question Considered in This Brief

Whether the First Amendment permits the State of Florida to compel a newspaper which publishes material critical of a candidate for public office to publish, in equal space and type, a reply by the candidate?

Interest of *Amicus Curiae*

NBC News, a division of NBC, is a news-gathering organization which prepares news and other informational programming on matters of public interest and concern which it furnishes to radio and television stations for broadcast in communities across the country.

The experience of the broadcast press is flatly contrary to the assumption of the Florida Supreme Court that "equal time" and "right of reply" formulations enhance First Amendment freedoms. This brief is submitted to illuminate that experience and thereby to demonstrate the factual error of the opinion here on review.

ARGUMENT

A State Statute Compelling Newspapers To Print Reply Material Which They Choose Not To Publish Violates The First Amendment.

Introduction

This landmark case has already led to exhaustive briefing on the part of all concerned, both the parties and their *amici* supporters. NBC believes that the case raises a legal issue far simpler of resolution than is often considered by this Court. Indeed, if the *Miami Herald* could cite no cases other than *Columbia Broadcasting System*,

Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) and *Mills* v. *Alabama*, 384 U.S. 214 (1966) and no text other than that of the First Amendment itself, we believe summary reversal would be justified.

We will not seek to add to the legal learning already before the Court with respect to the First Amendment itself. However, since the basis of the opinion of the Florida Supreme Court is that the statute in question "enhances rather than abridges freedom of speech and press," and since broadcasting has had experience with analogous, if less draconian rules,* we believe we can contribute to the information before the Court on that subject.

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* The editorializing rule of the Federal Communications Commission (the "Commission") requires a licensee who has editorially endorsed or opposed a candidate for public office to offer other candidates or their spokesmen "a reasonable opportunity" to "respond over the licensee's facilities." (47 C.F.R. § 73.123(c) (1972)) Neither that rule, nor the Commission's rules relating to "personal attacks" or equal time to rebut an actual appearance by a candidate (47 C.F.R. § 73.123(a), (b) (1972) and 47 U.S.C. § 315(a) (1970)) apply to "bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing program. . . .)." Thus, insofar as the Florida statute fails to exclude from its regulation material printed in the course of ordinary news coverage, it extends well beyond the directly comparable regulations in the broadcast field.

The fairness doctrine of the Commission, unlike the rules set out above, reaches such general news coverage insofar as that coverage presents views on "controversial issues of public importance." The courts and Commission alike have rejected, however, the contention that the doctrine imposes an equal time requirement generally with respect to the presentation of controversial issues. *See Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 292 (1970); *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 46 n. 133 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Democratic National Committee* v. *FCC*, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

Apart from illustrating the error of the Florida Supreme Court's reliance on regulation of the broadcast industry as support for its decision, the demonstration above of the unprecedentedly broad sweep of the Florida statute suggests another infirmity of the

The Broadcast Experience

Unlike the print press in this country, the broadcast press has been subject to limited governmental regulation of content through the mechanisms of various laws and regulations.

The most prominent of these are the Federal Communications Commission rules relating to "Equal Time", "Personal Attack and Political Editorials" and the Fairness Doctrine (See note, p. 4 *supra*). These have been predicated in part on the view that given the limited number of frequencies available,* such regulation was permissible in the interest of assuring the existence of "an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

In fact, the experience of broadcast journalism is that all these regulations have not, taken separately or together, "enhanced" freedom of speech or press. One example of this may be seen in the fact that it took a suspension of the equal time regulations to permit television to make one of its most significant contributions to public knowledge and awareness and to permit the kind of "uninhibited" programming television is often criticized for not carrying. Only the passage of legislation suspending the equal

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statute: its dangerous overbreadth. The statute may well inhibit newspaper coverage of general news issues unrelated, except in the most peripheral way, to the coverage of political campaigns or candidates which the Florida legislature apparently sought to regulate. Such overbreadth is itself a sufficient ground for reversing the decision below and holding the Florida statute unconstitutional. *See NAACP* v. *Button*, 371 U.S. 415 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

* *But see Brandywine-Main Line Radio, Inc.* v. *FCC, supra*, 473 F.2d at 80. (Bazelon, C.J. dissenting).

time rules *permitted* the broadcasting of the 1960 Kennedy-Nixon debates, which are often credited with leading to a larger percentage of voters going to the polls than ever before or since.*

The effects of governmental presence in these areas are felt by all broadcasters, but with particular harshness by the smaller ones which are understandably chary about confrontations with the very government that grants and considers renewals of licenses. As phrased by the Radio Television News Directors Association [RTNDA] in a recent submission to the FCC:

> "Indeed, it is the smaller stations and those stations less courageous and financially able than NBC which are the most sensitive to the 'lifted eyebrow' of government. Gradually editorial personnel of the news departments learn what management personnel know—that displeased government officials and private critics threaten a station's continued existence, or at least expensive litigation and damage to the station's good standing before the Commission." RTNDA Letter to FCC, July 16, 1973 re: *Complaint of Accuracy in Media, Inc.*, 8330-5, C2-2233, C2-1135, C11-2174.

As NBC Washington correspondent Bill Monroe pointed out in his testimony before the Senate Subcommittee on Constitutional Rights,

> ". . . there are stations that don't do investigative reporting. . . . There are stations that don't editorialize. There are stations that do editorialize but don't say anything.

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* *See generally* White, *The Making of The President 1960*, Chs. 11, 14 (1961).

"There are stations that do outspoken editorials but are scared to endorse candidates. My opinion is that much of this kind of caution, probably most of it, is due to a deep feeling that boldness equals trouble with Government, blandness equals peace." *Hearings on "Freedom of the Press" Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. 1st Sess. & 2d Sess. at 561 (1972). [Hereinafter cited as "Hearings."]

Moreover, it is an unfortunate truth that, as Mr. Monroe observed, "the FCC has no way to reward you for bold, controversial journalism. All it has is a way to harass you." Even a cursory review of the aftermath of many of broadcast journalism's "bold, creative" efforts documents the accuracy of that observation.

For example, each of the following news reports or discussions on problems in our society led to government investigations. However, these investigations were not of the problem exposed but of the *broadcaster* who chose to make such a report to the public:

The Selling of The Pentagon	*Complaint Concerning the CBS Program "The Selling of The Pentagon"*, 30 F.C.C. 2d 150 (1971)
Hunger in America	*Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C. 2d 143 (1969)
Abortion Laws	*Complaint by Voice for Innocent Victims of Abortion*, 42 F.C.C. 2d 335, *rev. denied*, F.C.C. No. 73—1219 (Nov. 29, 1973)

Welfare Problems—"The Battle of Newburgh"	*Complaint Under Fairness Doctrine Requirements by Joseph McD. Mitchell,* 40 F.C.C. 526 (1962)
Gambling and Official Corruption	*Complaint Under Fairness Doctrine Requirements by Hon. John F. Thompson,* 40 F.C.C. 523 (1962)
Conditions in San Francisco's Chinatown	*Complaint by Accuracy In Media, Inc.,* 39 F.C.C. 2d 1011 (1973)
Bureaucracy (Brinkley comment)	*Complaint by Gary Lane,* 38 F.C.C. 2d 45 (1972) *rev. denied,* 39 F.C.C. 2d 938 (1973)
Migrant: An NBC White Paper	FCC Staff Letter to NBC dated July 24, 1970
Sex Education in Schools	*Complaint by the National Coalition on the Crisis in Education,* 26 F.C.C. 2d 586 (1970)
Air Traffic Congestion and Air Safety	*Complaints Concerning National Broadcasting Co., Inc.,* 22 F.C.C. 2d 446, *set aside, Petition by National Broadcasting Co., Inc.,* 25 F.C.C. 2d 735 (1970)
Government Aid to Education	*Complaint by Committee to Preserve Religious Liberty,* 25 F.C.C. 2d 733 (1970)

1968 Democratic Convention in Chicago	*Complaints concerning Network Coverage of the Democratic National Convention*, 16 F.C.C. 2d 650 (1969)
Poor Peoples' Campaign	*Columbia Broadcasting System, Inc.*, 17 P&F RADIO REG. 2d 843 (1969)
Report on The Port of New York Authority	*Complaint by The Port of New York Authority*, 25 F.C.C. 2d 417 (1970).

The very fact of such governmental inquiries into news programming has had its inhibiting effects. The industry has voiced its concern over what the "right of reply" formula is doing to the flow of information. For example, Robert Barron, President of the North Carolina Association of Broadcasters, testifying at the hearings before the Senate Subcommittee on Constitutional Rights, quoted one station manager as saying:

> "'. . . now that the fairness doctrine has been expaned [sic] so drastically, we have given serious consideration to taking the editorials off the air, because of the potential of so many splinter group requests for air time.'"

• • •

Mr. Barron continued:

> "Another television manager in a large city said, 'In order to try to keep abreast of all the rules and regulations and court decisions these days, I seem to stay on the phone constantly with our legal counsel in Washington. And, on many issues, the lawyers throw their hands up in bewilderment. Our legal fees, because of

these matters, have doubled in the past 2 years. We live in the constant fear that one day we are going to be penalized for doing something wrong.'

"A radio station manager in a medium sized town in 'Piedmont North Carolina' said that the recordkeeping is unreasonably burdensome and took an inordinate amount of time away from running his station. He said he felt he could provide a better service to his community if he were not required to devote so much time to the problem of keeping up with FCC and court rulings." *Hearings* at 408.

Thoughtful newsmen have concluded that inhibition is inherent in the system. "The effect I know on myself," said Walter Cronkite, testifying in the hearings before the Senate Subcommittee on Constitutional Rights. He went on to say:

"It is a matter here of, as insidious as it is, being constantly alert to my own reactions of being influenced by this threat in being. . . . There is a new element of awareness of things over here that are extraneous to the clear objective judgment of that news as I make the news judgment. I may feel that I have not been influenced, that I have not been intimidated, in other words, but in bending over to avoid being intimidated, I am intimidated. It is kind of a rapidly accelerating merry-go-round, but I think this is what happens." *Hearings* at 103.

Management representatives, Julian Goodman, President of NBC, Frank Stanton, then President of CBS and Elmer W. Lower, President of ABC News, expressed similar concerns. (See *Hearings* at 145, *et seq.*, 53, *et seq.* and 233, *et seq.*) NBC's executive head, Julian Goodman,

with a 20 year background as a news producer and executive, testified in part as follows:

> "The FCC rule dealing with fairness—its system of regulations called the fairness doctrine—has little in common with journalism. We are increasingly concerned at the process by which Government judgments are being made in this field.
>
> • • •
>
> "Even more serious than the resulting confusion is the fact that the FCC is deep into the news area, and this sort of Government oversight of the journalistic function does interfere with freedom of press expression." *Hearings* at 147.

Finally, the Florida statute under review assumes that it will be immediately evident and beyond reasonable dispute when material published by a newspaper attacks the "official record" of a candidate or office holder or otherwise assails him in a manner sufficient to trigger the reply provisions of the statute. However, the experience of NBC and other broadcasters makes clear the difficulties—and dangers—of any governmental effort to define the issues dealt with in a journalistic piece or the viewpoint taken in such piece. Henry Geller, former General Counsel of the Federal Communications Commission, has noted the inherent difficulty of ". . . judging whether a program segment is for, against, or neutral in regard to a particular issue. In the gray areas that are bound to arise in this respect, serious questions arise about the appropriateness of a government agency making such sensitive programming judgments." Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action*, at 11

(1973).* If such "serious questions" as to improper government intrusion and broadcaster inhibition arise with respect to agency enforcement involving only civil sanctions in a regulated industry, how much more serious are the questions raised by such problems when criminal sanctions can be applied.

Conclusion

In certain respects, the First Amendment rights of print press journalists and those who are engaged in broadcast journalism have diverged as a consequence of congressional legislation and this Court's *Red Lion* ruling. Questions as to the further implications of *Red Lion* for broadcast journalism are not before this Court today. However, for the Florida Supreme Court to suggest that the experience in the broadcast area should lead to a similar—not to say greater—constriction of the First Amendment rights of print press journalists is wholly insupportable.

We urge the Court to reverse the decision of the Florida Supreme Court.

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* *See e.g.*, the definitional problems raised before the Federal Communications Commission in *Wildnerness Society*, 31 F.C.C.2d 729, 732 (1971) and *Accuracy In Media, Inc.*, 28 P&F RADIO REG. 2d 1371 (1973), petition for review docketed *sub. nom. National Broadcasting Co., Inc.* v. *FCC*, No. 73-2256, D.C. Cir., December 21, 1973; *see also Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971).

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